Supreme Court, U.S.

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No.

IN THE

Supreme Court Of The United States

January Term, 1995

HERBERT MOORE AND DAVID JONES,
Petitioners

vs.

The State of Alabama,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PETITIONERS WERE DENIED THEIR FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE BASED ON THE AFFIDAVIT'S FAILURE TO ESTABLISH PROBABLE CAUSE FOR THE SEARCH WARRANT.

II. WHETHER THE PETITIONERS WERE DENIED THEIR FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE BASED ON THE AFFIANT'S INTENTIONAL AND RECKLESS MISREPRESENTATION REGARDING THE ALLEGED PRESENCE OF DRUGS AT THE CALAIS FOREST APARTMENT.

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Petitioners[1] respectfully pray that a Writ of Certiorari issue to review the Judgment of the Alabama Supreme Court on October 28, 1994, denying review of the issues raised concerning their convictions in Count Three of this case, previously affirmed by opinion of the Alabama Court of Criminal Appeals by Judgment of March 25, 1994.

[1] Petitioners' undersigned counsel respectfully submits that to the best of his knowledge, the style of this case accurately reflects all parties having an interest in its outcome.

OPINIONS BELOW

Petitioners timely appealed their judgments of convictions and sentences to the Alabama Court of Criminal Appeals. By Judgment of March 25, 1994, the Alabama Court of Criminal Appeals affirmed their convictions and sentences for Count Three, and reversed Counts One and Two by opinion. Petitioners timely filed an Application for Rehearing in the Alabama Court of Criminal Appeals. The Application for Rehearing was denied without opinion by the Alabama Court of Criminal Appeals on May 27, 1994.

Petitioners timely filed a Petition for Writ of Certiorari to review the Judgment of the Alabama Court of Criminal Appeals in the Alabama Supreme Court. The Alabama Supreme Court denied the writ by order dated October 28, 1994.

These orders appear in full in the Appendix hereto.

STATEMENT OF JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(3). This Petition was timely filed within ninety days of the date of the Alabama Supreme Court's Judgment and Order of October 28, 1994.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. Amend. XIV, § 3.

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. Amend. IV.

STATEMENT OF THE CASE

In February 1992, Petitioners Herbert Moore and David Jones were indicted by the Madison County Grand Jury in Huntsville, Alabama. Robbie Moore and Shelia Jones were also indicted. Count One of the indictment charged Herbert Moore, David Jones, and Robbie Moore with Trafficking Cocaine on July 12, 1991, while at or near 3310 East Tucker Drive, Madison County, Alabama. Count Two of the indictment charged Herbert Moore and David Jones with Trafficking Cocaine on July 12, 1991, while at or near 3310 East Tucker Drive, Madison County, Alabama. Count Three, which is the subject of this Petition, charged Herbert Moore, David Jones, and Shelia Jones with Trafficking Cocaine on July 12, 1991, while at or near 3784 University Drive, Calais Forest Apartments in Madison County, Alabama.

On April 13, 1992, numerous motions were filed on behalf of the Defendants including a Motion to Suppress Evidence. The Motion to Suppress raised the issue before this court by clearly stating that the "search warrant was illegally issued and was not based on probable cause to justify its issuance" (C. 15). Following a hearing on the Motion to Suppress, the undersigned attorney argued that the Affidavit for Search Warrant contained an inten-

tional or reckless misrepresentation (C. 49) and that the affidavit failed to establish probable cause for the issuance of the search warrant for 3784 University Drive, Apartment 1826, Calais Forest Apartment (C. 47). Following the aforementioned hearing, a brief in support of the Defendants' motion was filed, but the Defendants' Motion to Suppress Evidence was denied by the trial court (C. 69 and R. 118).

The Defendants were arraigned and entered a plea of not guilty on August 6, 1992. The case went to trial on February 22, 1993, and on February 24, 1993, the jury returned a verdict as follows: "For Shelia Jones, Count Three, we find her not guilty. For Robbie Moore, Count One, we find him guilty. For David Jones, on all three Counts, we find him guilty. For Herbert Moore, on all three Counts, we find him guilty" (R. 563). The court discharged Shelia Jones. Herbert Moore, Robbie Moore, and David Jones were taken into custody, adjudged guilty by the Court, and sentencing was set for April 16, 1993.

On April 16, 1993, Herbert Moore was sentenced under the Alabama Habitual Offender Act to Life Without a Possibility of Parole on each of the three charges. The sentences were to run consecutive. He was also fined $50,000 under Counts One and Two, and $100,000 on Count Three. David Jones was given consecutive sentences of 30 Years Imprisonment under each of the three counts. He was also ordered to pay a $50,000 fine in each case. Robbie Moore was sentenced under Count One to 30 Years Imprisonment and ordered to pay a $50,000 fine. Oral Notice of Appeal was immediately given, and written Notice of Appeal was given on April 20, 1993.

On March 25, 1994, the Alabama Court of Criminal Appeals reversed Counts I and II of the indictment based on the arresting officers' patently illegal search of David Jones' residence, and affirmed Count III by opinion rejecting the Defendants' argument that the Calais Forest

affidavit, which contained an intentional or reckless misrepresentation, did not establish probable cause for the issuance of the search warrant (Appendix hereto). An Application for Rehearing was filed by the Appellants on April 8, 1994 and was overruled without opinion by the Alabama Court of Criminal Appeals on May 27, 1994 (Appendix hereto). The Petitioners then timely filed a Petition for Writ of Certiorari in the Alabama Supreme Court, which was denied without opinion on October 28, 1994 (Appendix hereto).

REASON FOR GRANTING THE WRIT

I. Petitioners were denied their Fourth Amendment right against unreasonable searches and seizures which has been applied to the States through the Fourteenth Amendment. Specifically, the search warrant for 3784 University Drive, Apartment 1826, Calais Forest Apartments, was issued based on insufficient probable cause. In the alternative, the Affidavit for Search Warrant included an intentional or reckless misrepresentation regarding the alleged presence of controlled substances at 3784 University Drive, Apartment 1826, which was essential to a determination of probable cause.

Petitioners submit that the record is clear that they were egregiously deprived of their fundamental and constitutionally protected right against unreasonable search and seizure. Specifically, the Petitioners assert that the State of Alabama violated their right against unreasonable search and seizure in two distinct ways. First, the search warrant for 3784 University Drive, Apartment 1826, Calais Forest Apartments, was issued without probable cause as defined by the holdings of the United States Supreme Court. Secondly, the Investigator's Affidavit for Search Warrant contained an intentional or

reckless misrepresentation regarding the alleged presence of controlled substances in the apartment in question. Petitioners submit that both of these errors represent a significant deprivation of their Fourth Amendment constitutional rights as interpreted by this Honorable Court and each merits granting of the Writ.

A. Petitioners were denied their Fourth Amendment right against unreasonable searches and seizures based on the affidavit's failure to establish probable cause for the search warrant of 3784 University Drive, Apartment 1826, Calais Forest Apartments.

1. Facts

On July 12, 1991, Investigator David Sedberry of the Huntsville Police Department, began making tape recordings of conversations between confidential informant Charles Edwards and Appellant Herbert Moore (R. 24). All but two of the phone calls were made on a three-way calling system wherein Sedberry was in a location away from the confidential informant and Herbert Moore (R. 249). It was Investigator Sedberry, not the confidential informant, who actually dialed the number and called Appellant Moore after the informant, Charles Edwards, was already on the telephone line (R. 164, 166-170). There was no allegation that any of these phone calls were made to the Calais Forest Apartment in question.

During the course of the aforementioned phone calls, the confidential informant allegedly arranged to purchase an amount of cocaine from the appellant, Herbert Moore. The transaction was to take place at the home of David Jones, 3310 East Tucker Drive, Huntsville, Alabama. This alleged transaction was the basis for Count One of the indictment against Herbert Moore, Robbie Moore, and David Jones (R. 265-266). After the alleged

sale, Investigator Sedberry began trying to obtain search warrants for 3310 East Tucker Drive, and an apartment located at Calais Forest Apartments, 3784 University Drive, Apartment 1826 (R. 272). The Affidavit for Search Warrant for 3784 University Drive, Apartment 1826, Calais Forest Apartments, which is the subject of this petition, states in part as follows:

> I have been personally informed by a reliable and confidential informant; that certain personal property, more particularly described as follows, to wit: cocaine, U.S. currency derived from the sale of illegal drugs, is concealed in or about the dwelling, house, mobile home, apartment or other building or premises or privately owned vehicle of Shelia Jones located at: 3784 University Drive, Apart. 1826, Calais Forest Apartments, Huntsville, Madison County, Alabama, or which said vehicle is described as . . . I further depose and say that the reason for my belief that the above mentioned information is reliable and for my belief that the reliability of the aforementioned informant is as follows: Investigators have received information that Herbert "Duck" Moore, Robbie Moore, and David Jones have been trafficking cocaine in the Huntsville area for some time. Herbert Moore is a convicted drug offender. Investigators have made numerous purchases from H. Moore and R. Moore through the use of confidential informant(s). David Jones has been present during several sales of cocaine to the confidential informant(s). H. Moore purchased furniture which was delivered to Calais Forest Apartments, 3784 University Drive, Apartment 1826, which is listed to Shelia Jones, the daughter of David Jones. Information has been received from confidential, reliable informant(s) that Shelia Jones recently went to Miami, Fl. to assist

> and/or arrange for the purchase of cocaine by Herbert Moore. Within twenty-four hours of this affidavit, Investigators observed Robbie Moore and Herbert Moore leave the residence of 3784 #1826 University Drive and followed them to 3310 East Tucker Drive and they subsequently delivered a quantity of cocaine to a confidential, reliable informant who then surrendered that cocaine to this investigator. Both subjects (Moore's) were observed returning to the Calais Forest Apartments #1826, and it is believed more cocaine may be present at that location. H. Moore has made taped statements indicating that he recently received cocaine for sale; these statements were made to the confidential informant. The apartment was leased by Shelia Jones per the management, and H.S.V. Utilities shows Shelia Jones listed as the utility holder at that residence (C. 28-29).

The search warrants were signed by Judge James R. Sturdivant on the same day, July 12, 1991, at approximately 2:25 p.m.

After the search warrants were signed by Judge Sturdivant, but before they were executed, another transaction was allegedly arranged between the confidential informant and Herbert Moore. Once again, the transaction was to take place at the home belonging to David Jones on East Tucker Drive. The confidential informant was given $16,000 in city money to make a drug purchase from Herbert Moore (R. 277). After the transaction allegedly took place, the confidential informant exited Jones' residence. Immediately upon his leaving the house, the police battered down the door to the residence with a battering ram (R. 27-28) and (R. 329-331). There was no allegation that any illegal transactions occurred at the Calais Forest Apartments nor that any

drugs had been seen at that location prior to the execution of the search warrants.

The search in question in this petition, the one involving the Calais Forest Apartment, was executed simultaneously with the East Tucker Drive search warrant. When the search warrant was executed at the Calais Forest Apartment no one was present other than law enforcement personnel (R. 294). An amount of cocaine was recovered from the apartment (R. 294). This was the basis of Count Three of the indictment, and the cocaine which the Petitioners presently argue should have been suppressed.

2. Deprivation of Petitioners' Fourth Amendment right against unreasonable search and seizure.

The Fourth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, states that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. Amend. IV. In accordance with this constitutional provision, *Rule 3.9, Alabama Rules of Criminal Procedure,* requires that a search warrant issue only upon a finding of probable cause supported by an affidavit "naming or describing the persons and particularly describing the property and the place to be searched." The affidavit must state *specific facts and circumstances* to support a finding of probable cause. *Alford v. State,* 381 So.2d 203 (Ala. Crim. App. 1979), *cert. denied,* 381 So.2d 206 (Ala. 1980); *Tyler v. State,* 45 Ala. App. 155, 227 So.2d 442 (1969).

An affidavit that is based primarily on information received from an informant must meet additional requirements. These standards are set out in *Illinois v. Gates,* 462 U.S. 213, 193 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Aguilar v. Texas;* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The "Aguilar-Spinelli two-prong test" requires that, (1) the underlying circumstances reveal the basis of the informant's knowledge that certain persons had been, was, or would be involved in criminal activities or that evidence of the crime could be found where he said they would be found, and (2) that the underlying circumstances given cause to believe that the informant is a credible person or that his information is reliable. In 1983, the United States Supreme Court formulated a more flexible standard for evaluating the facial sufficiency of an affidavit based on an informant tip. The *Gates, supra,* "totality of the circumstances test" replaces the more rigid two-pronged test of *Aguilar, supra,* and *Spinelli, supra.*

> The task of the issuing magistrate is simply to make a practical common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Gates,* 193 S.Ct. at 2332 (quoting *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 75, 4 L.Ed.2d 697 (1960)).

Although *Gates, supra,* relaxed the standards for probable cause determination, it is clear that the *Aguilar-Spinelli* analysis has not been eliminated from the factors that the magistrate must consider. "Though an informant's *veracity* and *basis of knowledge* are no longer to be understood as entirely separate and independent re-

quirements, they are still highly relevant in determining whether probable cause exists." *Gates,* 462 U.S. at 237. *Gates, supra,* therefore, abandoned only the strict application of the old test, *not* the substance of veracity, reliability, and basis of knowledge.

When the *Gates* "totality of the circumstances test" is applied to the facts in this case, it is clear that the supporting affidavit does not establish the necessary probable cause for the issuance of a search warrant. In his affidavit for a search warrant for 3784 University Drive, Apartment 1826, Calais Forest Apartments, the affiant, David Sedberry, stated as follows:

> I have been personally informed by a reliable and confidential informant; that certain personal property, more particularly described as follows, to wit: cocaine, U.S. currency derived from the sale of illegal drugs, is concealed in or about the dwelling, house, mobile home, apartment or other building or premises or privately owned vehicle of Shelia Jones located at: 3784 University Drive, Apart. 1826, Calais Forest Apartments, Huntsville, Madison County, Alabama, or which said vehicle is described as . . . I further depose and say that the reason for my belief that the above mentioned information is reliable and for my belief that the reliability of the aforementioned informant is as follows: Investigators have received information that Herbert "Duck" Moore, Robbie Moore, and David Jones have been trafficking cocaine in the Huntsville area for some time. Herbert Moore is a convicted drug offender. Investigators have made numerous purchases from H. Moore and R. Moore through the use of confidential informant(s). David Jones has been present during several sales of cocaine to the confidential informant(s). H. Moore purchased furniture

> which was delivered to Calais Forest Apartments, 3784 University Drive, Apartment 1826, which is listed to Shelia Jones, the daughter of David Jones. Information has been received from confidential, reliable informant(s) that Shelia Jones recently went to Miami, Fl. to assist and/or arrange for the purchase of cocaine by Herbert Moore. Within twenty-four hours of this affidavit, Investigators observed Robbie Moore and Herbert Moore leave the residence of 3784 #1826 University Drive and followed them to 3310 East Tucker Drive and they subsequently delivered a quantity of cocaine to a confidential, reliable informant who then surrendered that cocaine to this investigator. Both subjects (Moore's) were observed returning to the Calais Forest Apartments #1826, and it is believed more cocaine may be present at that location. H. Moore has made taped statements indicating that he recently received cocaine for sale; these statements were made to the confidential informant. The apartment was leased by Shelia Jones per the management, and H.S.V. Utilities shows Shelia Jones listed as the utility holder at that residence (C. 28-29).

The affidavit in this case is based purely on movement by some of the Defendants on July 12, 1991. Although the Defendants' movement may create a suspicion, probable cause requires more than a suspicion. *Moore v. State,* 441 So.2d 1003 (Ala. Crim. App. 1983). Nowhere in the affidavit and nowhere in the suppression testimony of David Sedberry can the existence of unlawful drugs be sufficiently connected to 3784 University Drive, Apartment 1826 (R. 79). The limited connection between the Appellants' activities on the day in question and the Calais Forest Apartment was clearly revealed by the affiant's testimony during the suppression hearing:

MR. BROUSSARD: You are saying you obtained one search warrant. The one you have referred to as being Tucker Drive, — and that's the location where the first transaction had occurred that morning?

MR. SEDBERRY: Yes, sir, it is.

MR. BROUSSARD: And you are saying that you obtained a search warrant on the Calais Forest Apartment because you had seen activity by the defendants during the time of these transactions?

MR. SEDBERRY: Specifically that morning just prior to that delivery at East Tucker Drive at approximately 10:00 a.m. Robbie Moore was observed leaving that address, and then shortly thereafter Herbert Moore was observed leaving that address, and both proceeded to the East Tucker Drive address.

MR. BROUSSARD: All right. When was it that you actually provided an affidavit to Judge Sturdivant, roughly?

MR. SEDBERRY: That was like 2:15 or 2:20 in the afternoon.

MR. BROUSSARD: But no other cases were made or anything from the time of that morning transaction until you obtained the search warrants?
MR. SEDBERRY: No.

(R. 14 to R. 15).

As the affiant admitted in response to the prosecutor's questions, there is no specific positive knowledge about anyone seeing cocaine in the Calais Forest Apartment.

Although the reviewing court should give deference to the judge or magistrate issuing the warrant, the Appellate courts should also make an independent determination

regarding the existence or lack thereof of probable cause. As this Honorable Court held in *United States v. Leon,* 468 S.Ct. 897, 104 S.Ct. 3405, 3416-3417, 82 L.Ed.2d 677 (1984):

> reviewing courts will not defer to a warrant based on an affidavit that does not 'provide the magistrate with a substantial basis for determining the existence of probable cause." *Illinois v. Gates, supra,* 462 U.S. at ___, 103 S.Ct. at 2332. 'Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.' *Ibid.* (Citations omitted). Even if the warrant application was supported by more than a 'bare bones' affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, *Illinois v. Gates, supra.*

In the case at bar, the warrant was based merely on the presence and movement of Robbie and Herbert Moore at the Calais Forest Apartment. This presence did not provide a sufficient nexus between the Appellants' alleged drug activities and the Calais Forest Apartment. Although Herbert and Robbie Moore may have been at the Calais Forest Apartment prior to the sales which occurred on July 12, 1991, police surveillance showed that the Appellants did not carry anything into or out of the Calais Forest Apartment (R. 50). Furthermore, Herbert and Robbie Moore went from the Calais Forest Apartment to the East Tucker Drive residence immediately prior to the first sale. This East Tucker Drive residence, not the Calais Forest Apartment, was the only residence

in which the confidential informant had seen any controlled substances. The only other assertions by the affiant involving the Calais Forest Apartment, that Herbert Moore purchased the Apartment's furniture and that Shelia Jones helped arrange the purchase of cocaine for Herbert Moore (C. 28), in no way proves that any controlled substances would be located at the Calais Forest Apartment. Although Judge Sturdivant may have had probable cause to issue a warrant for the East Tucker Drive residence, there was clearly not probable cause to issue a warrant for the Calais Forest Apartment.

Furthermore, unlike the affidavit regarding the East Tucker Drive residence, the Affidavit for Search Warrant for the Calais Forest Apartment did not state why the affiant believed his informant was credible, nor why the informant's information was reliable. As previously stated, even under the relaxed "totality of the circumstances" test enunciated in *Gates, supra,* the veracity of the informant is an important factor in determining if there is probable cause for the issuance of the search warrant. This deficiency, along with the insufficient connection between the Petitioners' alleged drug activities and the Calais Forest Apartment, shows that there was not probable cause to issue a warrant for the Calais Forest Apartment. The decisions of the Alabama Court of Criminal Appeals and the Supreme Court of Alabama in this case are clearly in conflict with the aforementioned decisions of this Honorable Court; therefore, this Petition for Writ of Certiorari is due to be granted.

B. Petitioners were denied their Fourth Amendment right against unreasonable searches and seizures based on the affiant's intentional or reckless misrepresentation regarding the alleged presence of drugs at 3784 University Drive, Apartment 1826, Calais Forest Apartments.

1. Facts

The facts previously stated in section (A)(1) of this Petition also apply to this issue.

2. Deprivation of Petitioners' Fourth Amendment right against unreasonable search and seizure due to affiant's intentional or reckless misrepresentation.

As previously enunciated, all individuals in the United States are protected by the Fourth Amendment's guarantee that "no warrants shall issue, but upon probable cause, supported by oath or affirmation." U.S. CONST. Amend. IV. The importance of an affiant being truthful in his or her assertions to the issuing Judge or Magistrate cannot be over emphasized. Yet, not only is the affidavit insufficient on its face to establish probable cause for the issuance of a search warrant, the affidavit concerning the Calais Forest Apartment location also contains false and misleading information. Investigator Sedberry stated in the affidavit:

> I have been personally informed by a reliable and confidential informant that certain personal property, more particularly described as follows, to wit: cocaine, U.S. currency derived from the sale of illegal drugs, *is concealed* in or about the dwelling, house, mobile home, or apartment, or other building or premises, or privately owned vehicle of Shelia Jones located at 3784 University Drive, Apartment 1826,

> Calais Forest Apartments (C. 28). (Emphasis added).

In fact, Investigator Sedberry was never informed by anyone that drugs were present in the Calais Forest Apartment or that drugs had *ever* been seen in the apartment. To include this assertion in his affidavit was a flagrant and intentional misrepresentation of fact to Judge James R. Sturdivant.

The law regarding intentional or reckless misrepresentations in an affidavit for search warrant was clearly annunciated by this Honorable Court in *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 6667 (1978). In *Franks,* 438 U.S. at 155-156, 98 S.Ct. at 1276, this court held that:

> Where the Defendant makes a substantial preliminary showing that a *false statement, knowingly* and *intentionally,* or *with reckless disregard for the truth* was included by the affiant in the warrant affidavit, and that the alleged false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the Defendant's request. In the event that at the hearing the allegation of perjury or reckless disregard is established by the Defendant by a *preponderance of the evidence,* and with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to *establish probable cause,* the *search warrant must be voided,* and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. (Emphasis added).

The Court further noted:

> There must be allegations of *deliberate falsehood* or of *reckless disregard for the truth,* and those allegations must be accompanied by an offer of

> proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false, and they should be accompanied by a statement of supporting reason. (Emphasis added.) *Franks,* 98 S.Ct. at 2684.

Finally, in addressing the action of law enforcement officers, the *Franks* opinion noted that:

> Because it is the magistrate who must determine independently whether there is probable cause (citation omitted), it would be an *unthinkable imposition* upon his authority if a warrant affidavit, revealed after the fact to contain a *deliberately or reckless false statement,* were to stand beyond impeachment. (Emphasis added.) *Franks,* 98 S.Ct. at 2681.

The United States Court of Appeals Eleventh Circuit has also addressed the present issue, and in doing so, cited *Franks, supra.* In *United States v. Haimowitz,* 706 F.2d 1549 (11th Cir. 1983), the Defendant argued that the affidavit was insufficient. In deciding the case, the Court of Appeals reiterated the holding in *Franks,* saying:

> There must be allegation of deliberate falsehood or recklessly disregard for the truth, and those allegations must be accompanied by an offer of proof.

The United States Court of Appeals also addressed this issue in *United States v. Astroff,* 578 F.2d 133 (5th Cir. 1978). The *Astroff* case concerned the validity of a search warrant which was issued pursuant to an affidavit containing a negligent misrepresentation necessary to the establishment of probable cause. The Court of Appeals also cited the *Franks* case in formulating their decision, holding:

> That where the Defendant makes a substantial preliminary showing that a *false statement, knowingly and intentionally or with reckless disregard for the truth,* was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the Defendant's request. (Emphasis in original *Astroff* case.)

The *Franks* issue has also been addressed by Alabama Appellate Courts. In *Sims v. State,* 587 So.2d 1271 (Ala. Cr. App. 1991), the Defendant argued that the trial court erred in not suppressing the evidence recovered in his home, since his home was searched as a result of a warrant which he argued contained false statements in the supporting affidavit. The Court of Criminal Appeals stated:

> The United States Supreme Court in *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), recognized the importance of the veracity of the statements made in the affidavit to support a search warrant. 'The Achilles Heal of any warrant is the presence of probable cause for the same: and this, in turn, can be resolved by resorting to the supporting affidavit'. (Citation omitted.) *The veracity of the assertions supporting probable cause is integral to the criminal justice system.* (Citation omitted.) *The warrant clause itself takes the affiant's good faith as its premise.* (Emphasis added.) *Id.* at 1274.

Even if this Honorable Court holds that the affidavit, on its face, is sufficient to establish probable cause, the affidavit is clearly insufficient to establish probable cause if the aforementioned misrepresentation is deleted. The affiant did not merely state that he had reason to believe that cocaine was located at the Calais Forest Apartment.

To the contrary, he falsely asserted to the issuing Judge that he had "been personally informed by a reliable and confidential informant that . . . cocaine, U.S. currency derived from the sale of illegal drugs, *is concealed* in or about the dwelling, house, . . . " (C. 28). Yet, even the District Attorney prosecuting this case admitted that he would "readily agree with Mr. Luker that there is no specific positive knowledge about anyone seeing cocaine in there". (R. 70). Since neither the affiant nor the informant had any positive knowledge regarding the presence of cocaine at the Calais Forest Apartment, this misrepresentation should have been stricken from the affidavit. Without this false assertion, the affidavit was clearly insufficient to establish probable cause for the search warrant. As argued in issue one, the mere presence of the Defendants at the Calais Forest Apartment is not enough to establish probable cause for the warrant. This Honorable Court has held that suppression is the "appropriate remedy if the magistrate or judge in issuing a warrant was misled by the information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth," *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 3421, 82 L.Ed.2d 677 (1984), and based on the preceding facts and law, the Petitioners' Motion to Suppress Evidence should have been granted due to the affiant's intentional or reckless misrepresentation.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment of the Alabama Supreme Court.

Respectfully submitted,

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APPENDIX A

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1993-94

CR-92-1183

Herbert Moore, David Jones, Robbie Moore

v.

State

Appeal from Madison Circuit Court
(CC-92-495; CC-92-496; and CC-92-497)

TAYLOR, JUDGE

This case involves four defendants, three of whom were convicted as a result of searches at two locations. The appellants, Herbert Moore,[1] David Jones, and Robbie Moore, were charged in a three-count indictment with trafficking in cocaine. Count one of the indictment charged all three appellants with trafficking in cocaine seized during the search of David Jones's residence. Count two of the indictment charged Herbert Moore and David Jones with trafficking in cocaine seized during the search of David Jones's residence. Count three of the indictment charged Herbert Moore, David Jones, and his

[1]Indicted as Herbert "Duck" Moore.

daughter, Shelia Jones,[2] with trafficking in cocaine seized during the search of Shelia Jones's apartment.

The three appellants were tried jointly and were found guilty as charged in the indictment. Herbert Moore was sentenced as a habitual felony offender to life in prison without parole on each count, the sentences to be served consecutively. David Jones was sentenced to 30 years in prison on each count, the sentences to be served consecutively. Robbie Moore was sentenced to 30 years in prison.

The illegal drugs that were the subject of the trafficking charges were discovered during two searches, resulting from two search warrants. One warrant authorized the search of David Jones's residence and the other authorized the search of Shelia Jones's apartment. Because the search of David Jones's residence was unconstitutional, the convictions of these drug traffickers must be reversed as to counts one and two of the indictment.

The appellants contend that the search warrant authorizing the search of David Jones's house at 3310 East Tucker Drive in Huntsville, was illegally executed. They point out that the officers gave no notice of their presence, of their purpose, or of the fact that they had a search warrant, and that they made no request of the occupants to open the door. The evidence is uncontradicted that the officers entered the house by bashing the door with a battering ram. One of the police officers testified in effect that the officers shouted the word "Police!" as they raced down the driveway carrying the battering ram and immediately before ramming the door.

David Jones testified that he heard running and that the next thing he knew, the door crashed open. He was

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[2]Shelia Jones was tried with the appellants and was found not guilty.

sitting on the couch in the living room with his wife and children. Herbert Moore and Robbie Moore were also in the house. He stated that the police came in yelling "Stick your hands up. Police." Then they began the search.

It is fundamental that law enforcement authorities should not enter a home until and unless they have announced their presence and demanded entry. This principle was acknowledged and applied as long ago as 1603 in the English case of Semayne's Case, 77 Eng. Repr. 194 (1603). The court stated:

> "In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors* . . . for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it . . ."

77 Eng. Repr. at 195-96. (Emphasis added.)

As the Supreme Court of Rhode Island in *State v. Carufel*, 112 R.I. 664, 314 A.2d 144 (1974), stated:

> "Although the origin of this rule, which is applicable to both arrest and search warrants, is rooted in the common law, the rule itself has constitutional dimensions. The knock and announce requirement is embodied in the fourth amendment and thus applicable against the states through the Fourteenth Amendment."

> See *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963), and *Sabbath v. United States*, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968). See also *State v. Dusch Inc.*, 289 N.E.2d 515 (1972)."

314 n.2d at 147.

The United States Constitution states:

> "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

U. S. Const., Amend. IV. Art. I, §5, Ala. Const. of 1901, states the same fundamental principle and also applies to this case.

Because we are interpreting a provision of the United States Constitution, the United States Supreme Court's cases interpreting that provision are controlling. That Court in *Miller v. United State*, 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958), *Ker v. California*, 374 U.S. 23, 83 S. Ct. 1623, 10 L.Ed.2d 726 (1963), and *Sabbath v. United States*, 391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828 (1968), addressed the application of the federal "knock-and-announce" statute, 18 U.S.C. §3109. That statute is substantially the same as the Alabama statute that has been in our Code since 1852. §15-5-9, Code of Alabama 1975. See also Annot., *What Constitutes Compliance with Knock-And-Announce Rule in Search of Private Premises — State Cases*, 70 A.L.R. 3d 217 (1976).

The United States Supreme Court has recognized that states may enact laws pertaining to searches and seizures. These laws are to implement and must not violate the Fourth Amendment of the United States Constitution.

"The States are not . . . Precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain."

Ker, 374 U.S. at 34, 83 S.Ct. at 1630, 10 L.Ed.2d at 730.

The United States Supreme Court in *Miller* stated:

"We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in §3109 the reverence of the law for the individual's right of privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house."

Miller, 357 U.S. at 313, 78 S.Ct. at 1197-98, 2 L.Ed.2d at 1340. (footnote omitted)

Justice Brennan, dissenting in part in *Ker v. California*, discussed the compelling reasons behind the knock-and-announce requirement.

> "Two reasons rooted in the Constitution clearly compel the courts to refuse to recognize exceptions in other situations when there is no showing that those within were or had been made aware of the officers' presence. The first is that any exception not requiring a showing of such awareness necessarily implies a rejection of the inviolable presumption of innocence. The excuse for failing to knock or announce the officer's mission where the occupants are oblivious to his presence can only be an almost automatic assumption that the suspect within will resist the officer's attempt to enter peacefully, or will frustrate the arrest by an attempt to escape, or will attempt to destroy whatever possibly incriminating evidence he may have. Such assumptions do obvious violence to the presumption of innocence. Indeed, the violence is compounded by another assumption, also necessarily involved, that a suspect to whom the officer first makes known his presence will further violate the law. It need hardly be said that not every suspect is in fact guilty of the offense of which he is suspected, and that not everyone who is in fact guilty will forcibly resist arrest or attempt to escape or destroy evidence.
>
> "The second reason is that in the absence of a showing of awareness by the occupants of the officers' presence and purpose, 'loud noises' or 'running' within would amount, ordinarily, at least, only to ambiguous conduct. Our decisions in related contexts have held that ambiguous conduct cannot form the basis for a belief of

> the officers that an escape or the destruction of evidence is being attempted. *Wong Sun v. United States*, 371 U.S. 471, 483-484, 83 S.Ct. 407, 415-416, 9 L.Ed.2d 441; *Miller v. United States*, supra, at 311, 78 S. Ct. at 1196-97, 2 L.Ed.2d 1332."

Ker, 374 U.S. at 55-56, 83 S.Ct. at 1641-42, 10 L.Ed.2d at 751-52. (Footnote omitted.)

The United States Supreme Court in *Miller v. United States* recognized that there are exceptions to the knock-and-announce requirement. That court stated:

> "There are some state decisions holding that justification for noncompliance exists in *exigent circumstances*, as, for example, when the officers may in good faith believe that they or someone within are in peril of bodily harm, *Read v. Case*, 4 Conn. 166 [1822], or that the person to be arrested is fleeing or attempting to destroy evidence."

357 U.S. at 309, 78 S.Ct. at 1195-96, 2 L.Ed.2d at 1338. (Emphasis added.)

In *Sabbath v. United States*, the United States Supreme Court reversed a defendant's conviction because the law enforcement officers failed to comply with the same constitutional provision at issue here. The court stated the following about the absence of exigent circumstances in *Sabbath*:

> "[T]his record does not reveal any substantial basis for excusing the failure of the agents here to announce their authority and purpose. The agents had no basis for assuming petitioner was armed or might resist arrest, or that [the officers were] in any danger. Nor, as to the former, did the agents make any independent investigation of petitioner prior to setting the stage for his arrest with the narcotics in his possession."

Sabbath, 391 U.S. at 591, 88 S.Ct. at 1759. Similarly, Alabama courts have reversed a number of cases for violation of the constitutional right to freedom from unreasonable search and seizure. See, e.g., *Ex parte Gannaway*, 448 So.2d 413 (Ala. 1984), *McReynolds v. State*, 568 So.2d 850 (Ala. Cr. App. 1989), and *Reynolds v. State*, 46 Ala. App. 77, 238 So. 2d 5 57, cert. denied, 286 Ala. 740, 238 So.2d 560 (1970).

What constitutes exigent circumstances that would excuse compliance with the knock-and-announce requirement? Alabama cases have not clearly defined "exigent circumstances." While there has been some "chipping away at" the principle under discussion in some state cases, the interpretations of the United States Supreme Court in matters involving the United States Constitution are controlling as are the definitions set out above.

The Tenth Circuit Court of Appeals defined "exigent circumstances" in *United States v. Stewart*, 867 F.2d 581 (10th Cir. 1989):

> *"The term 'exigent circumstances,' in conjunction with the entry of a residence during the execution of a search warrant, refers to those situations where "the officers believe there is an emergency situation and . . . their belief is objectively reasonable.' United States v. Spinelli*, 848 F. 2d 26, 29 (2d Cir.). *See also United States v. Flickinger*, 573 F. 2d 1349, 1355 (9th Cir.) (exigent circumstances are those which suggest an 'urgent need for immediate action'). The reasonableness of the officers' conduct hinges on the facts within their knowledge indicating exigency. [*United States v. McConney*], 728 F.2d [1195] at 1206 [(9th Cir. 1984)]. The conclusion of exigency under these facts must be especially clear in this case where there was no knock or warning whatsoever, where there was no information as to who was in the house, where the destruction of physical property took

> place, and where the occupants of the residence could be injured as a result of the entry. We must determine whether the officers, after considering the *particular* facts regarding the premises to be searched and the circumstances surrounding the execution of the warrant, could reasonably have decided that an urgent need existed for such an entry into the premises. *Jones v. United States,* 362 U.S. 257, 272, 80 S.Ct. 725, 737, 4 L.Ed.2d 697 ('a claim under 18 U.S.C. §3109 depends upon the particular circumstances surrounding the execution of the warrant') (citing *Miller v. United State,* 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 [1958])."

Stewart, 867 F.2d at 584. (First emphasis added; second emphasis original.)

The Second Circuit Court of appeals in *United States v. Spinelli,* 848 F. 2d 26 (2d Cir. 1988), stated:

> "[W]e adhere to the principle implicit in our prior cases that exigent circumstances may excuse noncompliance with the knock-and-announce requirement only where (1) *the officers believe there is an emergency situation* and (2) their belief is objectively reasonable. To excuse noncompliance either when the officers had no thought of emergency or when there was no reasonable basis for such thoughts would inappropriately compromise the privacy interest to be protected."

848 F.2d at 29. (Emphasis added.)

Whether exigent circumstances exist depends upon whether an "emergency situation" exists. An emergency situation exists "when the officers may in good faith believe that they or someone within are in peril of bodily harm . . . or that the person to be arrested is fleeing or attempting to destroy evidence." *Miller,* 357 U.S. at 309, 78 S.Ct. at 1195-96, 2 L.Ed.2d at 1338. Further, an emer-

gency situation must be evaluated as of the time the warrant is executed. *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), rev'd on other grounds, *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 64 L.Ed.2d 619 (1980).

The state cannot excuse compliance with this time honored principle of freedom from unreasonable search and seizure merely because of the easy destructibility of drugs when drugs are the object of the search.

> "A belief that contraband will be destroyed must be based upon sounds or activities observed at the scene or specific prior knowledge that a particular suspect has a propensity to destroy contraband. *No blanket exception exists for narcotics cases, in spite of the relative ease of disposal of drugs.*"

State v, Jeter, 30 Wash. App. 360, 634 P.2d 312, 314 (1981). Cf. *Armenteros v. State*, 554 So.2d 574 (Fla. App. 3 Dist. 1989).

When the state is seeking to use safety concerns to excuse compliance with the knock-and-announce requirement,

> "the government must show that the police had concrete, particularized evidence that reasonably led them to believe that (1) there were weapons on the premises and (2) there was a realistic possibility that the occupant or occupants would use the weapons against them."

Poole v. United States, 630 A.2d 1109, 1118 (D.C. App. 1993). See also Annot., *Sufficiency of Showing of Reasonable Belief of Danger to Officers or Others Excusing Compliance with "Knock and Announce" Requirement — State Criminal Cases*, 17 A.L.R. 4th 301 (1982).

It is common sense that any time authorities "signify the cause of . . . coming, and . . . make request to open doors", as the court in *Semayne's Case* phrased it, there

will be at least some opportunity to destroy or conceal evidence. See 77 Eng. Repr. at 195. But this is the price that we pay for "the right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures . . ." Amendment IV, United States Constitution.

As stated by the great William Pitt to the House of Commons in March 1763:

> "The poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter — all his force dares not cross the threshold of the ruined tenement."

This principle is rooted in the common law of England, and therefore our common law, *Carufel*, 314 A.2d at 147.

Investigator David Sedberry of the Huntsville Police Department testified that police had been told by an informant that Jones had guns in the house. However, it is not illegal for citizens of the United States, except exfelons, to have guns in the house. Exercise of the "right . . . to keep . . . arms," Amendment II, United States Constitution, does not lessen the protection against unreasonable searches and seizures. There is nothing in the record to indicate that the police knew that there was a person in the house who was in danger of imminent bodily harm. Neither was there any evidence that any police officer thought that he or she was in danger of immediate bodily harm. To the extent that the presence of guns alone was in itself considered an exigent circumstance, we overrule *BeShears v. State*, 593 So.2d 174 (Ala. Cr. App. 1991).

The mere presence of firearms within a dwelling does not mean that the person within was in immediate peril of bodily harm. This very issue was addressed by the Washington Court of Appeals in *Jeter*, supra. The court stated:

> "[T]he trial court's finding of exigent circumstances was based upon a belief that defendant could destroy the contraband and a concern for police safety based upon [the informant's] information that defendant kept a weapon. Neither provides a sufficient factual basis to rise to the level of exigent circumstances . . . [A] concern for police safety must be based upon prior knowledge or direct observation that the subject of the search keeps weapons and that such person has a known propensity to use them. Although the belief that defendant kept weapons is supported by police testimony at the omnibus hearing that [the informant] told them defendant kept a gun by his bed, police had no prior information that defendant had a known propensity to use the gun in resistance other than a general belief that a convicted felon may have such a propensity. Defendant, however, had no prior convictions for acts of violence or violence against law enforcement officers in particular."

30 Wash.App. at ___, 634 P.2d at 314. (Footnotes and citations omitted.) As the California Supreme Court stated in *People v. Dumas*, 9 Cal.3d 871, 109 Ca. Rptr. 304, 512 P.2d 1208, 1213 (1973):

> "[O]ne of the primary purposes of [the knock-and-announce statute] . . . is to prevent possible violent responses that might be aroused in a startled and fearful householder suddenly confronted with unknown persons breaking into his home for unannounced reasons. The danger that such a confrontation will result in serious

> injury or death to the occupant, police officers, or innocent bystanders is obviously intensified when the householder is in possession of a firearm. Thus, where the police are aware of such a weapon, the case for requiring them to give notice of their authority and purpose becomes more rather than less compelling."

(Citations omitted.)

In this case, the officers had no knowledge of an emergency situation, and, therefore no exigent circumstances existed. The alleged information from an informant, even if true, provided no justification for failure to comply with the knock-and announce requirement. The officers' actions violated the constitutional rights of the householder. *Stewart*, supra. See also *State v. Furry*, 31 Ohio App. 2d 107, 286 N.E.2d 301 (1971).

All items found as a result of the patently illegal search of David Jones's residence are therefore not admissible in evidence because they are "the fruits of a poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct, 407, 9 L.Ed.2d 441 (1963).

For the foregoing reasons, the convictions for the offense in counts I and II of the indictment must be reversed.

II

The appellants next contend that there was insufficient probable cause to issue the search warrant for Shelia Jones's apartment, 3784 University Drive, Apt. 1826, in Huntsville.

The affidavit supporting the issuance of that warrant reads as follows:

> "Investigators have received information that Herbert 'Duck' Moore, Robbie Moore, and David Jones have been trafficking cocaine in the

> Huntsville area for some time. Herbert Moore is a convicted drug offender. Investigators have made numerous purchases of cocaine from H. Moore and R. Moore through the use of confidential informant(s). David Jones has been present during several sales of cocaine to the confidential informant(s). H. Moore purchased furniture which was delivered to Calais Forest Apartment, 3784 University Drive, Apt. 1826, which is listed to Shelia Jones, the daughter of David Jones. Information has been received from confidential reliable informant(s) that Shelia Jones recently went to the Miami, FL area to assist and/or arrange for the purchase of cocaine by Herbert Moore. Within twenty-four hours of this affidavit, Investigators observed Robbie Moore and Herbert Moore leave the residence at 3784 #1826 University Drive and followed them to 3310 East Tucker Drive and they subsequently delivered a quantity of cocaine to a confidential reliable informant who then surrendered that cocaine to this investigator. Both subjects (Moores) were observed returning to the Calais Forest Apartments 1826 and it is believed more cocaine may be present at that location. H. Moore has made taped statements indicating that he recently received cocaine for sale; those statements were made to a confidential informant. The apartment was leased by Shelia Jones per the management and [Huntsville] Utilities shows Shelia Jones listed as the utility holder at that residence."

The court stated in *Poole v. State*, 596 So.2d 632, 641 (Ala. Cr. App. 1992):

> "'"For a search warrant to be sufficient and satisfy the constitutional requirement of probable cause, the affidavit upon which it is based must state specific facts and circumstances which sup-

port a finding of probable cause." *Carter v. State*, 405 So.2d 957, 959 (Ala. Cr. App.), cert. denied, 405 So.2d 962 (Ala. 1981).' *Callahan v. State*, 557 So. 2d 1292, 1304 (Ala. Cr. App.), affirmed, 557 So.2d 1311 (Ala, 1989), cert. denied, ___ U.S. ___, 111 S.Ct. 216 (1990). 'Probable cause to search a residence exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)].' *United States v. Jenkins*, 901 F.2d 1075, 1080 (11th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 259 (1990) . . . [T]here is no requirement of a 'showing that such a belief be correct or more likely true than false. A "Practical, nontechnical" probability that incriminating evidence is involved is all that is required.' *Texas v. Brown*, 460 U. S. [730] at 742, 103 S. Ct. [1535] at 1543, [75 L.Ed.2d 502 (1983)]. Additionally, 'where a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a common sense manner, and should resolve doubtful or marginal cases according to the preference to be accorded to warrants.' *Maddox v. State*, 502 So. 2d 779, 785 (Ala. Cr. App. 1985), affirmed in part, remanded on other grounds, 502 So.2d 786 (Ala.), cert. denied, 479 U.S. 932 (1986)."

See also *Witcher v. State*, [Ms. CR-91-1943, May 28, 1993] ___ So.2d ___(Ala. Cr. App. 1993).

This court must look at the totality of the information that was supplied to the magistrate before the warrant was issued. We do not "restrict [our] review to the 'four corners' of the affidavit. *United States v. Character*, 568 F.2d 442 (5th Cir. 1978)." *Wamble v. State*, 593 So. 2d 109, 110 (Ala. Cr. App. 1991).

There were sufficient facts to connect the appellants with the apartment on University Drive. Before selling cocaine to the informant earlier on the day the warrant was issued, Herbert Moore and David Jones had been at the University Drive apartment. After the sale they returned to the apartment. Herbert Moore had a prior conviction for selling drugs and Herbert and Robbie Moore had sold drugs to confidential informants on many occasions. Also, police had information that Shelia Jones, who leased the apartment, had been to Miami to assist in purchasing cocaine for Herbert Moore. Furthermore, the officer had established the reliability of this confidential informant. We hold that there was sufficient probable cause to issue the warrant for the apartment on University Drive.

The appellants also argue that the affidavit contained an intentional misrepresentation: that the informant had personally observed cocaine at the University apartment.

The appellants contend that the informant had not seen drugs at the apartment. The officer, however, did not make such a statement. He testified that he told the magistrate that the informant had *not* personally observed cocaine at the apartment.

III

The appellants further contend that the court erred in denying their motion for a mistrial based on questions asked during David Jones's testimony about telephone records that the state had failed to disclose pursuant to the discovery motion. The discovery motion contained in the record was never ruled on. No adverse ruling has been shown and therefore, noncompliance with an order of court has not been shown. In *Landreth v. State*, 600 So.2d 440 (Ala. Cr. App. 1992), we stated:

> "The record, however, reveals no ruling on that motion. Accordingly, this issue has not been preserved. Review on appeal is limited to matters as to which the trial court makes adverse rulings. *Donahoo v. State,* 552 So.2d 887 (Ala. Cr. App. 1989); *Jackson v. State,* 484 So.2d 1174 (Ala. Cr. App. 1985)."

600 So.2d at 445. Neither is this issue preserved for appeal.

For the reasons stated, the judgment of the circuit court is affirmed as to Count III of the indictment and reversed as to Counts I and II of the indictment. The cause is remanded to the Circuit Court for Madison County for proceedings not inconsistent with this opinion.

AFFIRMED AS TO COUNT III;
REVERSED AND REMANDED AS TO COUNTS I AND II.

ALL THE JUDGES CONCUR EXCEPT
McMILLAN, J., DISSENTS WITHOUT OPINION.

APPENDIX B

COURT OF CRIMINAL APPEALS

Court of Criminal Appeals No. 92-1183
(Madison Circuit Court No. CC92-495FB; 496FB; 497FB)

Herbert Moore David Jones Robbie Moore	vs.	State of Alabama
Appellant		Appellee

Dear Sir or Madam:

You are hereby notified that on May 27, 1994, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Applications for rehearing overruled. Rule 39(k) motions denied.

/s/ Lane Mann

LANE MANN
CLERK
COURT OF CRIMINAL APPEALS

David S. Luker ✓
G. Gregory White
2205 Morris Avenue
Birmingham, AL 35203

APPENDIX C

IN THE SUPREME COURT OF ALABAMA
October 28, 1994

1931271

Ex parte Herbert Moore and David Jones. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Herbert Moore, David Jones, Robbie Moore v. State) (92-1183) (Madison: CC-92-495; 496; 497)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

SHORES, J. — Hornsby, CJ., Maddox, Steagall and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 28 day of Oct., 1994.

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama

SUPREME COURT OF ALABAMA
OCTOBER TERM, 1994-95

1931277

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Herbert Moore, David Jones, and Robbie Moore

v.

State)

(Madison Circuit Court, CC-92-495, -496, -497;
Court of Criminal Appeals, CR-92-1183)

SHORES, JUSTICE.

WRIT DENIED.

Hornsby, C.J., and Almon, Houston, Steagall, Ingram, and Cook, JJ., concur.

Maddox, J., dissents.

MADDOX, JUSTICE (dissenting).

I would grant the writ in this case to review the holding by the Court of Criminal Appeals that the search in this case was illegal. The facts of this case are very similar to those in *State v. McFall*, [Ms. CR-92-1333, March 25, 1994] ___ So. 2d ___ (Ala. Cr. App. 1994), in which officers were executing a search warrant for illegal drugs and used a ram to gain entry. In *McFall*, the State appealed from the trial court's order granting McFall's motion to suppress. The Court of Criminal Appeals reversed.

In *McFall,* the defendant was charged with possession of a controlled substance, in violation of § 13A-12-212, Ala. Code 1975. He moved to suppress the marijuana and the drug paraphernalia found in his mobile home because, he argued, it was seized pursuant to an unlawful execution of a search warrant. Moore particularly argued that law enforcement officials had failed to comply with Alabama's "knock and announce" statute. § 15-5-9, Ala. Code 1975. The trial court, in granting this motion to suppress, held that there was "not sufficient time between the last knock and the forcible entry."

Section 15-5-9 provides: "To execute a search warrant, an officer may break open any door or window of a house, any part of a house or anything therein if after notice of his authority and purpose he is refused admittance."

In *McFall,* after setting out the evidence surrounding the search, the court held:

> "It is well settled that the 'weight and credibility to be attached to the testimony of . . . witnesses [at a suppression hearing is] a question for the trial judge.' *Kitchens v. State,* 445 So. 2d 1000, 1002 (Ala. Cr. App. 1984). Additionally, ' "[t]he findings of a trial court on a motion to suppress are binding on this court unless they are clearly erroneous." *Harper v. State,* 535 So. 2d 599, 600 (Ala. Cr. App. 1988), quoting *Simmons v. State,* 428 So. 2d 218, 219 (Ala. Cr. App. 1983).
>
> "This court, in *Beshears v. State,* 593 So. 2d 174, 175 (Ala. Cr. App. 1991), quoting *Laffitte v. State,* 370 So. 2d 1108, 1110 (Ala. Cr. App.), cert. denied, 370 So. 2d 1111 (Ala. Cr. App. 1979), held:
>
> "' "' "'Where it appears from facts adduced that an announcement of the offic-

> ers' purpose would frustrate a search, increase the personal peril of the executing officers or cause destruction of the evidence sought, there would be no necessity for compliance with the knock and announce rule, for these exceptions constitute 'exigent circumstances.'"' "'

"Additionally, in *Jackson v. State,* 589 So. 2d 781, 784-85 (Ala. Cr. App. 1991), this court stated:

> "'A refusal of admittance need not be express and "will oftentimes be present only by implication." *Laffitte v. State,* 370 So. 2d 1108, 1110 (Ala. Cr. App.), cert. denied, 370 So. 2d 1111 (Ala. 1979) (quoting *McClure v. United States,* 332 F.2d 19, 22 (9th Cir. 1964), cert. denied, 380 U.S. 945, 85 S.Ct. 1027, 13 L.Ed.2d 963 (1965)). "If the occupants of the dwelling fail to respond within a reasonable time, refusal can be presumed." *Irwin v. State,* 415 So. 2d 1181, 1183 (Ala. Cr. App.), cert. denied, 459 U.S. 971, 103 S.Ct. 302, 74 L.Ed.2d 283 (1982). "What constitutes a 'reasonable time' is necessarily dependent on the particular facts and circumstances of each individual case." Id. This time is "necessarily shortened" where illegal drugs are involved due to the great likelihood of the "easy and swift destruction of the evidence." *Harper v. State,* 535 So. 2d 599, 600 (Ala. Cr. App. 1988) (quoting *Irwin v. State,* 415 So. 2d at 1184).'"

___ So. 2d ___. The *McFall* court concluded that "[a]lthough the State failed to elicit testimony regarding how much time elapsed from the time the officers 'knocked and announced' until the point of entry, the facts of this case reveal that law enforcement personnel complied with the provisions of § 15-5-9." ___ So. 2d at ___.

I would grant the writ and review evidence to determine whether the law enforcement officer complied with

the provisions of § 15-5-9; after that review I might conclude that the Court of Criminal Appeals correctly decided the issue. There are a substantial number of cases annotated by the Michie editors under § 15-5-9 in which there has been a question regarding compliance with the statute, and involving factual settings that do not seem substantially different from this one, where the search was upheld.